

# *National security and the fourth estate in a brave new social media world*

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# NATIONAL SECURITY AND THE FOURTH ESTATE IN A BRAVE NEW SOCIAL MEDIA WORLD

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## 1. INTRODUCTION

For those working within security services, or operating as part of the media, whether that be as traditional journalist or broadcaster, or a blogger utilising social media, the myriad of laws and jurisprudence relating to how issues of national security, or terrorist activity, can be reported and disseminated, means navigating this area is both complex and challenging. This chapter aims to provide a road map to help to overcome some of these obstacles. It begins by considering the democratic function of the media, by virtue of its role as the 'Fourth Estate'. In doing so, it takes a multi-jurisdictional perspective, through recourse to a variety of international laws and jurisprudence. This acts as the foundation for the following sections, which provide analysis of the domestic and international legal principles and framework that the media are subject to, and operates within, when reporting on terrorist activity. Finally, the chapter considers how the print and broadcast media has reported terrorist activity in the past, and some of the problems that this has created. It concludes by analysing the changing media landscape, including the reasons for the demise of the traditional Fourth Estate, and the emergence, and ascendance, of citizen journalism, and an internet-based 'Fifth Estate'.

## 2. THE MEDIA LANDSCAPE: A MULTI-JURISDICTIONAL PERSPECTIVE ON THE PURPOSE OF THE MEDIA AS THE 'FOURTH ESTATE'

The jurisprudence of the European Court of Human Rights (ECtHR), interprets Article 10(1) of the European Convention on Human Rights (ECHR) to provide extended protection of the media, even in the absence of express provisions to that effect<sup>1</sup>. Thus, individuals and entities operating as part of the media enjoy a privileged position within the civil liberties matrix, as they are beneficiaries of the right to media

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<sup>1</sup> For example, see: *Vejdeland and others v Sweden* [2012] ECHR 242, [12]; *Jersild v Denmark* (1995) 19 EHRR 1, [31]; *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125, [63]; *Bergens Tidende v Norway* (2001) 31 EHRR 16, [57]; *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843, [67]; *Oberschlick v Austria (No 2)* (1998) 25 EHRR 357, [33]; *Prager and Oberschlick v Austria* (1995) 21 EHRR 1, [38]; *Thoma v Luxembourg* (2003) 36 EHRR 21, [45]-[46]; R. Clayton QC and H. Tomlinson QC, *Privacy and Freedom of Expression* (2<sup>nd</sup> ed. Oxford University Press, 2010), 271 [15.254].

freedom<sup>2</sup>. This right provides protection for ‘media communication’ over and above that afforded to non-media, pursuant to the right to freedom of expression<sup>3</sup>. So, why does ‘media’ occupy this special position?

The contribution of the media to democracy is well documented. It has been observed, both within the UK and internationally, that as well as being a ‘public educator’<sup>4</sup>, as ‘the Fourth Estate’<sup>5</sup>, the primary function of the media is to act as a ‘public watchdog’,<sup>6</sup> in that it operates as the general public’s ‘eyes and ears’ by investigating and reporting abuses of power<sup>7</sup>. The media’s role within democratic society manifests in its dissemination of information and ideas, and its facilitation of political debate and discourse on general issues of public interest<sup>8</sup>, including terrorist activity, and in enabling the public’s right to receive this information<sup>9</sup>. This is reflected in the work of Blasi, who is a leading proponent of the movement that posits the media as a ‘checking function’<sup>10</sup>. Blasi regards the media as a protected

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<sup>2</sup> The special position of the media in relation to the freedom of expression has been recognised by commentators such as Stewart J, Bezanson and West. See: P. Stewart J, ‘Or of the Press’, (1975) 26 *Hastings Law Journal* 705, 707; R.P. Bezanson, ‘The New Free Press Guarantee’ (1977) 63 *Virginia Law Review* 731, 733; S.R. West, ‘Awakening the Press Clause’ (2011) 58 *UCLA Law Review* 1025, 1032.

<sup>3</sup> For further discussion on a distinct right to media freedom, see: P. Coe, ‘Redefining ‘media’ using a ‘media-as-a-constitutional-component’ concept: An evaluation of the need for the European Court of Human Rights to alter its understanding of ‘media’ within a new media landscape’, *Legal Studies*; E. Barendt, *Freedom of Speech*, (2<sup>nd</sup> ed, Oxford University Press, 2005), ch. 12.

<sup>4</sup> In the UK see: *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd* [2001] 2 AC 277, [19]; For ECtHR jurisprudence, see: *Bergens Tidende v Norway* (2001) 31 EHRR 16, [49]; For the US, see: *Mills v Alabama* (1966) 384 US 214, 219; *Cox Broadcasting v Cohn* (1975) 420 US 469, 492; See generally: A. Lewis, ‘Journalists and the First Amendment’ in D. Kingsford-Smith and D. Oliver (eds), *Economical with the Truth: The Law and the Media in a Democratic Society*, (ECS Publishing Ltd, 1990), 1-7; D. Miloš, *Defamation and Freedom of Speech*, (Oxford University Press, 2008), 83.

<sup>5</sup> P. Stewart J, ‘Or of the Press’, (1975) 26 *Hastings Law Journal* 705, 708

<sup>6</sup> *The Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153, [59]; *Goodwin v United Kingdom* (1996) 22 EHRR 123, [39]; *Thorgeirson v Iceland* (1992) 14 EHRR 843, [63]; *Bladet Tromsø and Stensås v Norway* (2000) 29 EHRR 125, [62]; *Bergens Tidende v Norway* (2001) 31 EHRR 16 [49].

<sup>7</sup> *A-G v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, 183 per Sir John Donaldson MR; See also: E. Barendt, *Freedom of Speech*, (2<sup>nd</sup> ed. Oxford University Press, 2005), 418

<sup>8</sup> *Lingens v Austria* (1986) 8 EHRR 103, [26]; *Oberschlick v Austria (No 1)* (1991) 19 EHRR 389, [58]; *Castells v Spain* (1992) 14 EHRR 445, [43]; *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843; *Jersild v Denmark* (1995) 19 EHRR 1, [31]; *United Communist Party of Turkey and others v Turkey* [1998] App. no. 133/1996/752/951 [44].

<sup>9</sup> Article 10 ECHR includes the right to receive as well as impart information. In *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, [55], Sedley LJ described the right to receive information as ‘the lifeblood of democracy’. See also: *Sunday Times v United Kingdom* (1979) 2 EHRR 245, [65]; *Fressoz and Roire v France* (2001) 31 EHRR 2, [51]; *Bergens Tidende v Norway* (2001) 31 EHRR 16, [52].

<sup>10</sup> V.A. Blasi, ‘The Checking Value in First Amendment Theory’ (1977) *American Bar Foundation Research Journal*, 521; V.A. Blasi, ‘Journalistic Autonomy as a First Amendment Concept’ in R.H.

participant in the system of checks and balances inherent in democratic governments<sup>11</sup>. Consequently, investigative journalism, that is, ‘finding out what is really going on in society’<sup>12</sup>, is critical to the operation of democracy<sup>13</sup>. Thus, in *Reynolds v Times Newspapers Ltd*<sup>14</sup>, Lord Nicholls stated that a modern function of the media is investigative journalism: ‘[t]his activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally’.<sup>15</sup> More recently, Leveson LJ in his *Inquiry into the Culture, Practices and Ethics of the Press (Inquiry)*<sup>16</sup>, recognised that, in recent years, the media, and in particular the press, has played a critical role in informing the public on matters of public interest and concern<sup>17</sup>. This democratic function, and the extended privileges afforded to the media, has been endorsed within a number of different jurisdictions and arenas. For instance, the ECtHR has attached great importance to the role of the media<sup>18</sup>, and has been particularly vocal in championing media freedom, within limits, to ensure that the media can fulfill this vital purpose:

‘Although the press<sup>19</sup> must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public

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Keller Jr (ed), *In Honour of Justice Douglas” A Symposium on Individual Freedom and Government*, (Greenwood Press, 1979) 55, 68

<sup>11</sup> Blasi, ‘Journalistic Autonomy’, *ibid.* 69; See also: R. Hargreaves, *The First Freedom: A History of Free Speech*, (Sutton Publishing, 2002), 305.

<sup>12</sup> A. Belsey, ‘Journalism and Ethics: Can they Co-exist?’ in M. Kieran, *Media Ethics*, (Routledge, 1998), 1, 5.

<sup>13</sup> D. Milo, *Defamation and Freedom of Speech*, (Oxford University Press, 2008), 82

<sup>14</sup> [2001] 2 AC 127.

<sup>15</sup> *ibid.* 200.

<sup>16</sup> Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press*, November 2012

<sup>17</sup> *ibid.* 455-470

<sup>18</sup> For example, see: *Bladet Tromsø and Stensås v Norway* (2000) 29 EHRR 125, [59]; *Bergens Tidende v Norway* (2001) 31 EHRR 16, [48]; *Busuioc v Moldova* (2006) 42 EHRR 14, [64]-[65]; *Jersild v Denmark* (1995) 19 EHRR 1; *Janowski v Poland (No 1)* (2000) 29 EHRR 705, [32].

<sup>19</sup> The jurisprudence of the ECtHR has determined that the protection afforded to the press extends to audiovisual media: *Jersild v Denmark* [1994] App. no. 15890/89 [31]; *Radio France and others v France* [2004] App. no. 53984/00 [33]

also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’<sup>20</sup>.

Consequently, according to the Strasbourg Court, the media ‘affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. It is incumbent on the press to impart information and ideas on political issues and on other subjects of public interest’<sup>21</sup>.

In the context of the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee (HRC) has also recognised the media’s importance to the operation of democracy. For instance, in *Bodrožić v Serbia and Montenegro* the Committee stated that ‘in circumstances of public debate in a democratic society, especially in the media, concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high’<sup>22</sup>. Further, in *Marques de Morais v Angola*<sup>23</sup>, the Committee endorsed the role of the media in giving effect to Article 25 ICCPR, which provides for the right to take part in the conduct of public affairs<sup>24</sup>. Although not relating to the ICCPR, this endorsement by the Committee of the public affairs function of the media assimilates closely with Lord Bingham’s judgment in the House of Lords’ case of *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd*<sup>25</sup>, in which he stated:

‘But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and

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<sup>20</sup> *Axel Springer AG v Germany (No. 1)* [2012] App. no. 39954/08 [79]; *Von Hannover v Germany (No. 2)* [2012] App. nos. 40660/08 and 60641/08 [102]. See further: *Sunday Times v United Kingdom (No. 1)* [1979] App. no. 6538/74 [65]; *Bladet Tromsø and Stensaa v Norway* [1999] App. no. 21980/93 [62]; *Times Newspapers Ltd v United Kingdom (Nos. 1 and 2)* [2009] App. nos. 3002/03 and 23676/03 [40].

<sup>21</sup> *Centro Europa 7 Srl and Di Stefano v Italy* [2012] App. no. 38433/09 [131]; *Lingens v Austria* [1986] App. no. 9815/82; *Süreş v Turkey (No. 1)* [1999] App. no. 26682/95 [59]; *Thoma v Luxembourg* [2001] App. no. 38432/97 [45].

<sup>22</sup> HRC, *Bodrožić v Serbia and Montenegro* [2005] Communications no. 1180/2003 [7.2].

<sup>23</sup> [2005] Communication no. 1128/2002 [6.8]

<sup>24</sup> See also: General Comment no. 25, [25]

<sup>25</sup> [2001] 2 AC 277

informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring'.<sup>26</sup>

Further afield, the Inter-American Court of Human Rights (IACtHR) has stated that the media plays a critical role in exercising the 'social dimension' of freedom of expression in a democracy<sup>27</sup>. According to the Court, journalists 'keep society informed' and play an 'indispensable' role in enabling 'society to enjoy full freedom'<sup>28</sup>. Consequently, journalism 'is one of the most important manifestations of freedom of expression and information'<sup>29</sup>. In the South African case of *Khumalo v Holomisa*<sup>30</sup> the Constitutional Court held that in a democracy the media 'are important agents in ensuring that government is open, responsive and accountable to the people.'<sup>31</sup> The media is also obliged to provide citizens with information and with 'a platform for the exchange of ideas which is crucial to the development of a democratic culture.'<sup>32</sup> In the US, Black J, in the Supreme Court case of *Mills v Alabama*<sup>33</sup>, stated: 'the press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.'<sup>34</sup>

Media freedom, freedom of expression and democracy are inextricably and intrinsically linked with each other, as the media is an important democratic cog within society. However, as will be discussed later in this chapter, in recent years, there has, arguably, been a 'shift' in the focus of the traditional media, that is, the press and broadcasting industry. Consequently, citizen journalism, through social media, has taken on some of the 'democratic responsibilities' previously associated

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<sup>26</sup> *ibid.* [19]

<sup>27</sup> *Fontevicchia and D'Amico v Argentina* [2011] Case 12.524 [44]; *Ivcher-Bronstein v Peru* [2001] Case 11.762 [149]; *Herrera-Ulloa v Costa Rica* [2004] Case 12.367 [117]

<sup>28</sup> *Ivcher-Bronstein v Peru* [2001] Case 11.762 [150]; *Herrera-Ulloa v Costa Rica* [2004] Case 12.367 [119]

<sup>29</sup> IACtHR, Advisory Opinion OC-5/85 [71]; IAComHR, *Hugo Bustios Saavedra v Peru* [1997] Case 10.548 [71]; Office of the Special Rapporteur for Freedom of Expression with the Inter-American Commission on Human Rights, Inter-American Legal Framework Regarding the Right to Freedom of Expression, 2009, CIDH/RELE/INF. 2/09, para. 165

<sup>30</sup> (2002) (5) SA 401 (CC)

<sup>31</sup> *ibid.* [23]

<sup>32</sup> *ibid.* [24]

<sup>33</sup> (1966) 384 US 214

<sup>34</sup> *ibid.* 219; See also: *Cox Broadcasting v Cohn* (1975) 420 US 469, 492.

with the ‘Fourth Estate’, including the reporting of terrorist activity. Before this is considered, the following section will look at how the media’s role as the Fourth Estate interacts with the legal framework relating to the reporting of terrorist activity.

### 3. REPORTING ON TERRORISM: LEGAL PRINCIPLES AND FRAMEWORK

The principles of freedom of expression and media freedom afford wide-ranging protection to both individuals and the media. It will come as no surprise that both protect the dissemination of information and ideas that are inoffensive or ‘popular’. However, the ambit of these principles goes much further as, according to the ECtHR, they also provide protection for expression that may ‘offend, shock or disturb the state or any sector of the population’<sup>35</sup>. Media freedom is, therefore, founded on the notion that liberal discussion on matters of public interest and concern is more conducive to the operation of democracy than the suppression of expression that may be offensive, shocking, disturbing or unpopular<sup>36</sup>. However, despite the protection that media freedom can provide, the media is still obliged to exercise its democratic function within a complex legal framework relating to the reporting of public order interests, including, terrorist activity. Thus, very often, a balance has to be struck between, what can be, conflicting interests.

#### A. THE ROLE OF THE STATE IN PROTECTING ‘PUBLIC ORDER’

In *Sürek v Turkey* (No. 2 and No. 3) and *Incal v Turkey*<sup>37</sup> the ECtHR stated that, because the government is in a dominant position when it comes to public discourse, it has to refrain from interfering with media freedom via governmental channels of communication<sup>38</sup>. Despite this, the Court made it clear in both *Sürek* cases, and in *Incal*, that in order for ‘competent’ government authorities to effectively exercise their function as guarantors of public order, they must be able to adopt measures which allow them to appropriately, and without excess, deal with remarks, which

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<sup>35</sup> *Handyside v United Kingdom* A 24 (1976); 1 EHRR 737, [49]; See also, *Éditions Plon v. France* App. No 58184/00 ECHR 2004-IV, [42]-[43]

<sup>36</sup> J. Oster, *Media Freedom as a Fundamental Right*, (Cambridge University Press, 2015), 193.

<sup>37</sup> (No. 2) [1999] App. no. 24122/94; (No. 3) [1999] App. no. 24735/94; *Incal* [1998] App. no. 41/1997/825/1031.

<sup>38</sup> *ibid.* (No. 2) [34]; (No. 3) [37]; *Incal* [54].



themselves threaten public order, by exceeding the boundaries of civilised discourse<sup>39</sup>, regardless of whether those remarks emanate from the media or non-media. The jurisprudence from Strasbourg reflects the qualifications imposed by Article 10(2) ECHR on the Article 10(1) right to freedom of expression. Pursuant to Article 10(2), freedom of expression (and media freedom) can be legitimately interfered with ‘in the interests of national security, territorial integrity or public safety’ and for the ‘prevention of disorder or crime’. Consequently, the ECtHR has consistently re-stated that the media must not exceed the boundaries set, inter alia, ‘for the protection of vital interests of the State, such as the protection of national security or territorial integrity against the threat of violence or the prevention of disorder or crime’.<sup>40</sup> This position is mirrored by other international laws. For instance, Articles 19(3)(b) and 13(2)(b) of the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR) respectively, allow freedom of expression to be restricted to protect national security or public order. Similarly, the HRC and the African Commission on Human and Peoples’ Rights (AfComHPR) have stated that freedom of expression can be legitimately restricted to safeguard and strengthen national unity under challenging political circumstances<sup>41</sup>, and Article 27(2) of the African Charter on Human Rights states that each individual’s rights and freedoms shall be exercised ‘with due regard to collective security...and common interest’<sup>42</sup>.

So, what does ‘public order’ mean, and does it cover, for instance, the dissemination or reporting of, terrorist speech? According to scholars such as Grote and Wenzel, the notion of ‘public order’ includes the preservation of fundamental interests required by the State to guarantee public safety and to protect the interests of

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<sup>39</sup> *ibid.*

<sup>40</sup> *Sürek v Turkey (No. 1)* [1999] App. no. 26682/95 [59]; *Şener v Turkey* [2000] App. no. 26680/95 [41]; *Özgür Gündem v Turkey* [2000] App. no. 23144/93 [58].

<sup>41</sup> HRC: *Mukong v Cameroon* [1994] Communication no. 458/91 [9.7]; AfComHPR: *Article 19 v Eritrea* [2007] App. no. 275/03 [108].

<sup>42</sup> As observed by Oster, although ‘public order’ is not expressly referred to within Article 27(2), it is included in the term ‘common interest’: J. Oster, *Media Freedom as a Fundamental Right*, (Cambridge University Press, 2015), 193. Oster compares: African Commission on Human and Peoples’ Rights, *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria* [1998] App. nos. 105/93, 128/94, 130/94 and 152/96 [73]; *Constitutional Rights Project, Civil Liberties and Media Rights Agenda v Nigeria* [1999] App. nos. 140/94, 141/94 and 145/95 [43]; *Scanlen & Holderness v Zimbabwe* [2009] App. no. 297/05 [109].

society generally<sup>43</sup>. Similarly, the IACtHR has interpreted public order to mean ‘the conditions that assure the normal and harmonious functioning of [democratic] institutions based on a coherent system of values and principles’.<sup>44</sup> The ECtHR has recognised that the concept of ‘order’ includes, inter alia, order in the public sphere, such as on public streets and in public places<sup>45</sup>. According to the jurisprudence of the Court, the ‘prevention of crime’ justification, pursuant to Article 10(2) is, in essence, inherent within public order<sup>46</sup>, which includes the prevention of specific criminal offences, the deterrence and control of crime generally, as well as the investigation of crimes that have, allegedly, already been committed<sup>47</sup>. Therefore, public order encompasses expression related to terrorist activity.

There is an inextricable link between freedom of expression, media freedom, public order and democracy. As a result, public order does not just legitimise interference with freedom of expression<sup>48</sup>. The concept, equally, ‘requires the broadest possible circulation of information, opinions, news and ideas – that is the maximum degree of exercise of freedom of expression’.<sup>49</sup> Thus, pursuant to a multitude of international laws, such as those discussed above, if a democratic state is concerned that public order could be threatened by discourse or the communication of information or ideas relating to, for instance, terrorism, the dissemination of that expression can be restricted. However, any such restriction of freedom of expression and media freedom, justified on the grounds of public order concerns, must be interpreted to conform strictly to the demands of a democratic society<sup>50</sup> and, consequently, must ‘be based on real and objectively verifiable causes that present the certain and credible threat of a potentially serious disturbance of the basic conditions

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<sup>43</sup> R. Grote and N. Wenzel, ‘Meinungsfreiheit’, in T. Marauhn and R. Grote (eds.), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, (2<sup>nd</sup> ed. Mohr Siebeck, 2013), [85]; J. Oster, *Media Freedom as a Fundamental Right*, (Cambridge University Press, 2015), 194.

<sup>44</sup> IACtHR, Advisory Opinion OC-5/85 [64].

<sup>45</sup> *Chorherr v Austria* [1993] App. no. 13308/87 [28].

<sup>46</sup> J. Oster, *Media Freedom as a Fundamental Right*, (Cambridge University Press, 2015), 196.

<sup>47</sup> *Orban and others v France* [2009] App. no. 20985/05 [42].

<sup>48</sup> J. Oster, *Media Freedom as a Fundamental Right*, (Cambridge University Press, 2015), 194-195.

<sup>49</sup> Office of the Special Rapporteur for Freedom of Expression with the Inter-American Commission on Human Rights, Inter-American Legal Framework Regarding the Right to Freedom of Expression, 2009, CIDH/RELE/INF. 2/09 [81]; IACtHR, Advisory Opinion OC-5/85 [69]; AfComHPR, *Scanlen & Holderness v Zimbabwe* [2009] App. no. 297/05 [109].

<sup>50</sup> Office of the Special Rapporteur for Freedom of Expression with the Inter-American Commission on Human Rights, Inter-American Legal Framework Regarding the Right to Freedom of Expression, 2009, CIDH/RELE/INF. 2/09 [80].

for the functioning of democratic institutions’.<sup>51</sup> Accordingly, ‘[m]ere conjecture regarding possible disturbances of public order, nor hypothetical circumstances...that do not clearly present a reasonable threat of serious disturbances’ are insufficient to warrant interference with media freedom<sup>52</sup>.

## B. THE INTERNATIONAL LEGAL FRAMEWORK

The public order and inherent prevention of disorder or crime rationales, that can provide legitimate justification for the interference with the rights to freedom of expression and media freedom, have become particularly important in relation to the restriction of publications, as well as orders to reveal journalistic sources for, inter alia, reasons pertaining to the fight against terrorism<sup>53</sup>. By virtue of its status as a Member State of, for instance, the UN Security Council, Council of Europe and the European Union, there are a number of international legal instruments that apply to the UK and its citizens in respect to terrorism, and the reporting of terrorist activity. However, the application of these laws are subject to certain overarching principles pertaining to the operation of a democratic state, including the rights to freedom of expression and media freedom, that require a balance to be struck. The ECtHR and HRC have recognised that, on the one hand, the media has a right and duty, as the Fourth Estate, to ‘convey information and ideas on political issues, even divisive ones’<sup>54</sup> and both inform the public on measures prescribed by the state to maintain public order, and prevent crime, including terrorism, and form public opinion on such activities. On the other hand, democracies have a right to defend themselves against abuses directed at the very democratic values that underpin them.<sup>55</sup> Consequently, the jurisprudence of both the HRC and the ECtHR has affirmed that a broad margin of appreciation should be afforded to Member State authorities<sup>56</sup> ‘to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and with out excess to [remarks that] incite to violence

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<sup>51</sup> *ibid.* [82].

<sup>52</sup> *ibid.*

<sup>53</sup> J. Oster, *Media Freedom as a Fundamental Right*, (Cambridge University Press, 2015), 196.

<sup>54</sup> ECtHR: *Özgür Gündem v Turkey* [2000] App. no. 23144/93 [58]; *Şener v Turkey* [2000] App. no. 26680/95 [41]; HRC, General Comment no. 34 [46].

<sup>55</sup> J. Oster, *Media Freedom as a Fundamental Right*, (Cambridge University Press, 2015), 198.

<sup>56</sup> *ibid.*

against an individual or a public official or a sector of the population’.<sup>57</sup> Therefore, a rather delicate ‘balance’ has to be struck by state authorities to determine whether proposed measures to protect, for example, national security against threats of terrorism, are suitable. To do this, the authorities embark upon careful analysis of the respective situation, and attempt to predict how it may develop. As a result, there is always a high degree of factual uncertainty with this exercise. In applying the margin of appreciation, the courts will decide whether the aims of the state’s authorities justify any potential interference with countervailing civil liberties, and that they do not disproportionately impact upon other fundamental democratic rights, such as freedom of expression and media freedom<sup>58</sup>. Indeed, according to the ECtHR in *Klass and others v Germany*<sup>59</sup>, states are not permitted to adopt whatever measures they see fit, even to deal with terrorism: states may not undermine, or even destroy democracy, on the premise of defending it<sup>60</sup>.

This ‘balancing act’, and the HRC and Strasbourg Court’s jurisprudence, is reflected by other international laws. According to its preamble, UN Security Council Resolution 1624 (2005) condemns ‘in the strongest terms the incitement of terrorist acts and [repudiates] attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts’. Article 1(a) of the Resolution ‘[c]alls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to prohibit by law incitement to commit a terrorist act or acts’.<sup>61</sup> However, the Resolution also refers to the right to freedom of expression, pursuant to Article 19 of the Universal Declaration of Human Rights and Article 19 ICCPR, and ‘that any restrictions thereon shall only be such as are provided by law and are necessary on the grounds set out in [Article 19(3) ICCPR].

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<sup>57</sup> ECtHR: *Sürek v Turkey (No. 1)* [1999] App. no. 26682/95 [61]; *Şener v Turkey* [2000] App. no. 26680/95 [40]; *Erdoğan v Turkey* [2000] App. no. 25723/94 [62]; HRC: *A.K. and A.R. v Uzbekistan* [2009] Communication no. 1233/2003 [7.2].

<sup>58</sup> J. Oster, *Media Freedom as a Fundamental Right*, (Cambridge University Press, 2015), 198-199.

<sup>59</sup> [1978] App. no. 5029/71.

<sup>60</sup> *ibid.* [49]

<sup>61</sup> Resolution 1624 (2005), Adopted by the Security Council at its 5261<sup>st</sup> meeting, on 14<sup>th</sup> September 2005, S/RES/1624 (2005). Oster argues that, pursuant to the Resolution’s preamble, Article 1 does not, therefore, require States to adopt measures to prohibit justification or glorification or terrorist acts: J. Oster, *Media Freedom as a Fundamental Right*, (Cambridge University Press, 2015), 196.

Other international instruments, including the Council of Europe Convention on the Prevention of Terrorism (CECPT) and the EU Framework Decision (EUFD) on Combating Terrorism<sup>62</sup>, mirror the Resolution. Article 5(2) of the Convention requires Member States to prosecute, as a criminal offence, ‘public provocation to commit a terrorist offence’. Pursuant to Article 5(1), this entails ‘the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offence may be committed’. Similarly, Article 4(1) EUFD states that Member States must implement the necessary measures to ensure that inciting or aiding or abetting terrorist offences proscribed under Articles 2 and 3 are made punishable. In the same vein as Article 1(a) of Resolution 1624, Article 4(1) is also qualified by the EUFD itself. Recital 10 of the EUFD states that nothing in the Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms, including freedom of expression. Further, Article 2 of Recital 14 of the Framework Decision, amending the EUFD<sup>63</sup>, states that it:

‘...shall not have the effect of requiring Member States to take measures in contradiction of fundamental principles relating to freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination of limitation of liability.’

Despite this apparent appetite to strike a balance between the adoption of measures to protect state security and the need to ensure that the right to freedom of expression and media freedom are not disproportionately interfered with, in both *Purcell and others v Ireland*<sup>64</sup> and *Brind and others v United Kingdom*<sup>65</sup> the European

<sup>62</sup> Council Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism, OJ 2002, L164/3, amended by Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on Combating Terrorism, OJ 2002, L330/21.

<sup>63</sup> Council Framework Decision 2008/919/JHA of 28<sup>th</sup> November 2008 amending Framework Decision 2002/475/JHA on Combating Terrorism, OJ 2008, L330/21.

<sup>64</sup> [1991] App. no. 15404/89.

<sup>65</sup> [1994] App. no. 18714/91.

Commission of Human Rights (EComHR), allowed restrictions to be imposed on certain media organisations, in relation to their dissemination of speech associated with terrorist activity in Northern Ireland. In *Purcell* journalists and producers of radio and television programmes, employed by Radio Telefis Eireann, were instructed, pursuant to a ministerial Order issued under s31 of the Broadcasting Act 1961, to refrain from broadcasting any interview, or report of an interview, with spokesmen for the IRA or Sinn Féin. The EComHR found that such restrictions might cause the applicants (who also included broadcasting trade unions) ‘inconvenience in the exercise of their professional duties’.<sup>66</sup> However, despite this, it did not find that Article 10(1) was disproportionately interfered with, as live statements could ‘involve a special risk of coded messages being conveyed, a risk which even conscientious journalists cannot control within the exercise of the professional judgment’.<sup>67</sup> *Brind* also involved applicants employed as journalists and producers of radio and television programmes, as well as editors and presenters. It related to a request made by the British Home Department for the BBC and Independent Broadcasting Authority to broadcast a statement made by a representative of terrorist organisations, including Sinn Féin, Republican Sinn Féin and the Ulster Defence Association, only with a voice-over account spoken by an actor. The government’s reason for this was to limit the impact and influence any such statements would have on the supporters of terrorist organisations in the UK. The Commission held that there was no violation of Article 10(1) as the ‘limited extent of the interference’ with the applicants’ rights was not, in this instance, disproportionate to the measures imposed to effectively deal with the threat of terrorist activity.

It is perfectly reasonable to expect that states do not want to provide a ‘soap box’ for the dissemination of terrorist ideology or coded messages. However, this has to be balanced with the media’s right to inform the public as to potential threats to public order, and the public’s right to be informed, to enable decisions to be made on how to react<sup>68</sup>. Oster argues that ‘a sweeping concession to the Convention States as in *Brind* constitutes a severe obstacle to public discourse on a matter of paramount importance to society’. Instead, he advocates, that rather than such a severe ‘paternalistic’

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<sup>66</sup> *Purcell*, 17

<sup>67</sup> *ibid.*

<sup>68</sup> J. Oster, *Media Freedom as a Fundamental Right*, (Cambridge University Press, 2015), 200.

approach, a case-by-case analysis should be adopted.<sup>69</sup> This correlates closely with the jurisprudence of the ECtHR, which has suggested that such analysis would be based on whether the words used and the context within which they were written could incite criminal (including terrorist) activity or include coded messages<sup>70</sup>. Oster goes on to state that, if such an approach were to be adopted, ‘a publisher cannot be exonerated from any liability for the content of the third-party statements’.<sup>71</sup> This is because the Strasbourg Court has determined that a publisher is subject to the ‘duties and responsibilities’ of journalists in how they accumulate, and then communicate, information to the public. Accordingly, these ‘duties and responsibilities’ become even more significant during times of conflict and tension<sup>72</sup>. Consequently, it was held by the ECtHR in *Özgür Gündem v Turkey*<sup>73</sup> that ‘the fact that interviews or statements were given by a member of a proscribed organization cannot in itself justify an interference with the newspaper’s freedom of expression. Nor can the fact that the interviews or statements contain views strongly disparaging of government policy’.<sup>74</sup>

Because of its position as the Fourth Estate, and the special duties and responsibilities this bestows upon the media, those operating as part of the media are under an obligation not to advocate the use of violence, glorify war, or intend to stigmatise one side of the conflict<sup>75</sup>. In relation to situations where it is alleged the media has actually ‘advocated’ terrorist activity, according to the HRC, offences such as ‘encouragement of terrorism’<sup>76</sup>, ‘extremist activity’<sup>77</sup> and ‘praising’, ‘glorifying’ or ‘justifying’ terrorism, should be unequivocally defined to ensure that they do not

<sup>69</sup> *ibid.*

<sup>70</sup> *Süreş v Turkey (No. 1)* [1999] App. no. 26682/95 [63]; *Şener v Turkey* [2000] App. no. 26680/95 [44ff]; *Özgür Gündem v Turkey* [2000] App. no. 23144/93 [63], [65]; *Süreş and Özdemir v Turkey* [1999] App. nos. 23927/94 and 24277/94 [61].

<sup>71</sup> J. Oster, *Media Freedom as a Fundamental Right*, (Cambridge University Press, 2015), 200.

<sup>72</sup> *Süreş v Turkey (No. 1)* [1999] App. no. 26682/95 [63]; *Şener v Turkey* [2000] App. no. 26680/95 [42].

<sup>73</sup> The case related to dissemination by the newspaper, *Özgür Gündem*, of statements made by alleged terrorists. In this instance, it concerned declarations of PKK-related organisations and an interview with Abdullah Öcalan, the PKK leader.

<sup>74</sup> [2000] App. no. 23144/93 [63].

<sup>75</sup> *Süreş v Turkey (No. 1)* [1999] App. no. 26682/95 [62]; *Süreş v Turkey (No. 3)* [1999] App. no. 24735/94 [40]; *Özgür Gündem v Turkey* [2000] App. no. 23144/93 [70]; *Balsytė-Lideikienė v Lithuania* [2008] App. no. 72596/01 [79].

<sup>76</sup> HRC, Concluding observations on the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/CO/6), [26].

<sup>77</sup> HRC, Concluding observations on the Russian Federation (CCPR/CO/79/RUS), [20].

unnecessarily and disproportionately interfere with freedom of expression and media freedom, but rather they fully accord with the requirement of being ‘proscribed by law’.<sup>78</sup> The HRC has also made it clear that states must be able to specify exactly the details of the threat posed for national security if the publisher were to exercise its right to media freedom.<sup>79</sup> Thus, the Committee has held that ‘to muzzle advocacy of multi-party democracy, democratic tenets and human rights’ may not be justified even when legitimate objectives of national security or public order are concerned.<sup>80</sup>

### C. A VIEW FROM THE UK PART 1: DAVID MIRANDA, GLENN GREENWALD, EDWARD SNOWDEN AND THE TERRORISM ACT 2000

The UK’s media are subject to the international laws and incorporated principles set out in the previous section. In addition, the legal matrix within which our domestic media operates includes the Terrorism Acts 2000, which has impacted upon both the media’s right to protect the confidentiality of its sources, pursuant to media freedom, and the role of the UK’s security services<sup>81</sup>. A recent, and high profile, example of jurisprudence relating to the media’s interaction with the 2000 Act is the Court of Appeal’s decision in *R (David Miranda) v Secretary of State for the Home Department, Commissioner of Police of the Metropolis v Liberty, Article 19, English Pen and the Media Legal Defence Initiative*<sup>82</sup>. The case concerned consideration of, inter alia, section 1(1) and (2) and paragraph 2(1) of Schedule 7 of the 2000 Act, and Article 10(1) ECHR. Section 1(1) and (2), when read together, define terrorism as: (i) the use or threat of action which (ii) endangers a person’s life, other than that of the person committing the action where (iii) the use of threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public and (iv) the use or threat is made for the purpose of

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<sup>78</sup> HRC, General Comment no. 34, [46].

<sup>79</sup> *Park v Republic of Korea* [1998] Communication no. 628/1995 [10.3]; *Kim v Republic of Korea* [1999] Communication no. 574/1994 [12.4]; *Shin v Republic of Korea* [2004] Communication no. 926/2000 [7.2].

<sup>80</sup> *Mukong v Cameroon* [1994] Communication no. 458/91 [9.7]; See also, AfComHPR: *Article 19 v Eritrea* [2007] App. no. 275/03 [108].

<sup>81</sup> Please note that the Terrorism Act 2006 also contains provisions that may impact upon the media (see, for instance: section 1, which relates to the encouragement of terrorism, and its allied provisions). These provisions are discussed in more detail below.

<sup>82</sup> [2016] EWCA Civ 6.



advancing a political, religious, racial or ideological cause.<sup>83</sup> Pursuant to paragraph 2(1) of Schedule 7, a police officer has the power to stop and question a person at a port or border area for the purpose of determining whether they appear to be ‘concerned in the commission, preparation or instigation of acts of terrorism’.

The appellant, David Miranda, is the husband of Glenn Greenwald, a journalist who, at the time, was working for the *Guardian* newspaper. In late 2012 Greenwald and another journalist, Laura Poitras, met Edward Snowden. Snowden provided the pair with encrypted data that had been stolen from the US National Security Agency. In addition, the data included UK intelligence material. Some of this material formed the basis of a number of articles published by the *Guardian*. On 12<sup>th</sup> August 2013 Miranda travelled from Rio de Janeiro to Berlin to meet Poitras. He was carrying encrypted material deriving from data obtained by Snowden, and was tasked with collecting computer drives containing further material to assist Greenwald’s journalistic activity. The UK Security Service were aware of Miranda’s movements and, as a result, issued a Port Circulation Sheet informing counter-terrorism police that Miranda was knowingly carrying material, the release of which would endanger lives, and that the disclosure or threat of disclosure was designed to influence a government and was made for the ‘purpose of promoting a political or ideological cause’. The police were satisfied that sufficient information had been provided by the Security Service to allow a lawful Schedule 7 stop to take place. Consequently, on the 18<sup>th</sup> of August Miranda was stopped by counter-terrorism police officers at Heathrow airport, whilst travelling to Rio de Janeiro, and subsequently questioned by them.<sup>84</sup> It is important to note at this juncture that, at the time of being stopped, Miranda did not identify himself as a journalist (as he is not a journalist), or state that he was carrying ‘journalistic material’. Miranda issued judicial review proceedings. It is the decision of the High Court of the Divisional Court<sup>85</sup> that is the subject of the appeal<sup>86</sup>. Miranda submitted that the acts of the police were unlawful for the following reasons: Firstly, the Schedule 7 stop was exercised for a purpose that was not permitted by the 2000 Act. Secondly, the use of the power contravened Article 10 ECHR. Thirdly, in relation to journalistic material, Schedule 7 is incompatible with Article 10.

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<sup>83</sup> *ibid.* [39] per Lord Dyson MR.

<sup>84</sup> *ibid.* [6]-[20] per Lord Dyson MR.

<sup>85</sup> [2014] EWHC 255 (Admin) per Laws LJ.

<sup>86</sup> The leading judgment was given by Lord Dyson MR, with who Richards LJ and Floyd LJ agreed.

The Court of Appeal rejected the High Court's literal interpretation of the definition of terrorism, pursuant to section 1(1) and (2). Instead, the court held that Parliament must have intended for the provision to import a mental element to the definition of terrorism. This means that a defendant must intend that, or be reckless as to whether, the material that is published has the effect of endangering life or creating a serious risk to the health or safety of the public, or a section of the public<sup>87</sup>. Thus, in order for publication of material to amount to terrorism, the publication must satisfy the section 1(1) test, as follows: Firstly, the defendant intended that, or was reckless as to whether, the publication of the material would endanger life or create a serious risk to the health or safety of the public, or a section thereof; Secondly, the defendant intends the publication of the material to influence the government or an international governmental organisation or to intimidate the public, or a section thereof; Thirdly, publication of the material is for the purpose of advancing, inter alia, a political or ideological cause. In Miranda's case, the court held that the police were entitled to consider that material in his possession might be released in circumstances falling within the definition of terrorism, and this possibility was sufficient to justify the stop and detention<sup>88</sup>. The court noted that Parliament has set this bar at 'quite a low level', but held that the stop and detainment of Miranda was the type of police/security activity that Parliament intended when drafting the Act<sup>89</sup>.

The court further rejected that the use of the Schedule 7 power was, in this instance, an unjustified and disproportionate interference with a journalist's enhanced right to freedom of expression, pursuant to media freedom. This was on the basis that compelling national security interests outweighed Miranda's Article 10(1) rights. Although the court held that the police should have known Miranda's material 'was or might have been journalistic material'<sup>90</sup>, there was, according to the court, no reason to disagree with the Security Services' assessment that the material seized contained information that posed a risk to national security. Indeed, challenging such an assessment would be 'very difficult...in a court of law'<sup>91</sup>. Lord Dyson concluded by

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<sup>87</sup> [2016] EWCA Civ 6 [53]-[55].

<sup>88</sup> *ibid.* [57]-[58].

<sup>89</sup> *ibid.* [58].

<sup>90</sup> *ibid.* [67].

<sup>91</sup> *ibid.* [82].

stating that he ‘substantially’ agreed with Laws LJ’s judgment. In his Lordship’s judgment, although the Schedule 7 stop was an interference with media freedom, the compelling national security interests engaged by the potential harm of the material in Miranda’s possession ‘clearly’ outweighed his enhanced journalistic rights under Article 10<sup>92</sup>.

Finally, the court considered whether the Schedule 7 power, if used in respect of journalistic information or material, failed to be ‘prescribed by law’, pursuant to Article 10(2). *Liberty*, as interveners, argued that five principles could be derived from ECtHR jurisprudence on this point pursuant to *Sanoma Uitgevers v the Netherlands*<sup>93</sup>. The court rehearsed these principles<sup>94</sup>, which are also worthy of consideration here:

‘First, the protection of journalistic sources must be attended with legal procedural safeguards commensurate with the importance of the Article 10 principle at stake...Secondly, first and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body of any requirement that a journalist hand over material concerning a confidential source...Thirdly, the judge or other independent and impartial body must be in a position to carry out the exercise of weighing the potential risks and respective interests prior to disclosure. The decision to be taken should be governed by clear criteria...Fourthly, the exercise of an independent review that takes place only after the handing over of material capable of revealing such sources would undermine the very essence of the right to confidentiality and cannot therefore constitute a legal procedural safeguard commensurate with the rights protected by Article 10...Fifthly, however, in urgent cases, where it is impracticable for the authorities to provide elaborate reasons, an independent review carried out at the very least prior to the access and use of obtained materials should be sufficient to determine whether any issue of confidentiality arises, and if so, whether the public interest

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<sup>92</sup> *ibid.* [83]-[84].

<sup>93</sup> [2011] EMLR 4 [88].

<sup>94</sup> [2016] EWCA Civ 6 [100].

invoked by the investigating authorities outweighs the general public interest in source protection.’<sup>95</sup>

Thus, clearly the jurisprudence of the Strasbourg Court requires prior, or at the very least, in an urgent case, immediate *post factum*, judicial oversight of interferences with Article 10 rights in situations where journalists are required to reveal their sources. Without such oversight there are no sufficiently robust safeguards to render the interference with the right ‘prescribed’ by law. This is not surprising when considering the importance the ECtHR has attributed to the protection of journalistic sources pursuant to media freedom<sup>96</sup>.

In relying on this jurisprudence, the court found that although *Miranda*’s case did not concern disclosure of a journalist’s source, there was ‘no reason in principle for drawing a distinction between disclosure of journalistic material *simpliciter* and disclosure of journalistic material which may identify a confidential source’<sup>97</sup>. The court held that it would be impractical to assume an average journalist would be able to obtain an emergency interim injunction following detention under Schedule 7. Further, *post factum* judicial review would not restore the confidentiality of sources or material. Consequently, in line with *Sanoma*, the court held that the legal safeguards in place to avoid the risk that Schedule 7 could be exercised arbitrarily were inadequate. Thus, the court determined that Schedule 7 was incompatible with Article 10. The court noted that, while Strasbourg has not developed an ‘absolute’ rule of judicial scrutiny for such cases, some form of judicial or other independent and impartial scrutiny conducted in such a way as to protect the confidentiality in the material was considered the ‘natural and obvious safeguard against the unlawful exercise of...Schedule 7’<sup>98</sup>.

It remains to be seen what the impact of the decision in *Miranda* will be on the operation of media freedom in circumstances that engage conflicting security interests. Although, the court was clear in its judgment that the decision of how

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<sup>95</sup> *ibid.* citing *Sanoma Uitgevers v the Netherlands* [2011] EMLR 4 [88].

<sup>96</sup> See section 2 above. See also: *Sanoma Uitgevers v the Netherlands* [2011] EMLR 4 [88]-[92]; *Nordisk Film & TV A/A v Denmark* ([2005] App. no. 40485/02, 10.

<sup>97</sup> [2016] EWCA Civ 6 [107].

<sup>98</sup> *ibid.* [114].

safeguards to protect against the arbitrary use of Schedule 7 would be implemented would be left to Parliament, clearly the decision falls down in favour of free speech and media freedom principles and, in particular, the media's right to protect the confidentiality of their sources. Indeed, the court emphasised the importance of these principles, as follows:

'The central concern is that disclosure of journalistic material (whether or not it involves the identification of a journalist's source) undermines the confidentiality that is inherent in such material and which is necessary to avoid the chilling effect of disclosure and to protect article 10 rights. If journalists and their sources can have no expectation of confidentiality, they may decide against providing information on sensitive matters of public interest. That is why the confidentiality of such information is so important'<sup>99</sup>.

Following the decision, the Home Office stated: '[i]n 2015 we changed the code of practice for examining officers to instruct them not to examine journalistic material at all. This goes above and beyond the court's recommendations in this case.'<sup>100</sup>

#### D. A VIEW FROM THE UK PART 2: THE TERRORISM ACT 2006

As stated previously, the Terrorism Act 2006 also contains provisions that could impact upon the traditional media, as well as citizen journalists operating through social media<sup>101</sup>. For the purposes of media freedom, section 1, which relates to the encouragement of terrorism, and its allied provisions, are particularly pertinent. Although, as yet, there has been no jurisprudence in relation to the media's interaction with these provisions, they are worthy of consideration at this juncture.

Section 1 of the 2006 Act creates an offence of encouragement of acts of terrorism. The offence has been introduced to implement the requirements of Article 5 of the CECPT. As stated above, this requires States to have an offence of 'public

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<sup>99</sup> *ibid.* [113].

<sup>100</sup> 'Airport stop of Snowden reporter's partner David Miranda 'lawful'', <http://www.bbc.co.uk/news/uk-35343852> 19th January 2016 accessed 13<sup>th</sup> May 2016.

<sup>101</sup> See fn 81.

provocation to commit a terrorist offence'<sup>102</sup>. The offence is committed if a person publishes, or causes a statement to be published, and either intends the public to be, or is reckless as to whether the public will be, directly or indirectly encouraged or otherwise induced by the statement (taken as a whole, including the circumstances and nature of its publication) to commit, prepare or instigate acts of terrorism or CECPT offences. Pursuant to section 1(5), the commission of the offence is not contingent upon the statement actually relating to an act of terrorism. Indeed, the offence can still be committed regardless of whether any body is actually encouraged or induced to commit, prepare or instigate an act of terrorism or CECPT offence. Section 20 provides a number of definitions relating to the section 1 offence. According to section 20(4) 'publish' includes a person disseminating a statement (which, pursuant to subsection (6), means any type of communication, including without words) in any manner to the public. This includes providers and users of services that can be accessed by the public electronically. Consequently, it captures, for instance, citizen journalism via social media and blogs, as well as traditional print and broadcast media platforms.

Under Section 1(3) indirect encouragement of terrorism includes a statement that glorifies the commission or preparation of acts of terrorism or CECPT offences. However, this only applies if members of the public could reasonably be expected to infer that what is being glorified (which under section 20(2) includes praise or celebration) in the statement is conduct that should be emulated by them in existing circumstances. Section 20(7) clarifies that references to conduct that should be emulated in existing circumstances includes 'conduct that is illustrative of a type of conduct that should be so emulated'. Thus, for example, if it was reasonable to expect members of the public to infer from a Facebook or blog post glorifying an attempted suicide bomb attack on the London Underground that what should be emulated is action causing severe disruption to London's transport network, this will be caught by the section 1 offence.

This offence could impact upon freedom of expression and media freedom, in situations where a person operating as media has disseminated statements that could

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<sup>102</sup> See section 3.B.

encourage or induce etc. terrorist activity. Section 1(6) provides limited protection for the media in these circumstances. It gives rise to a defence where it has not been proved that the publisher *intended* the statement to encourage or otherwise induce the commission, preparation, or instigation of acts of terrorism or CECPT offences. However, if the publisher is found to have acted recklessly in this regard, they cannot rely on the defence. In relation to citizen journalism's facilitation of media freedom this could be problematic. Arguably, citizen journalists, that have perhaps not undergone the training associated with traditional journalism, and are less likely to have the same experience, resources and support at their disposal of, for instance, the print and broadcast media are, as a result, more likely to fall foul of having acted 'recklessly' in their dissemination of information. Consequently, in the future, it is likely that we will see prosecutions of citizen journalists relating to their 'reckless' publication of material, contrary to section 1.

For the defence to succeed the burden of proof rests on the defendant to show that: (i) the statement published neither expressed their views, nor had their endorsement, and (ii) that it was clear in all the circumstances of the statement's publication that it was not their view and did not have their endorsement. Section 3 can, in certain circumstances, add a further layer to the operation of the defence. It provides that a person cannot take advantage of the defence if they are deemed to endorse a statement because they have not complied, within two working days, with a notice, issued by a constable pursuant to subsection (3), to remove the statement from public view or alter it so that it is not related to terrorism. In situations where the defendant has complied with the notice, but the same or similar statement is posted again, they can still rely on the defence. In such a situation it may be difficult to tell if the statement is the statement to which the notice relates or a new one - a 'repeat statement'. Indeed, subsection (4) provides that the person against whom the notice was issued will be regarded as having endorsed repeat statements. However, this is subject to subsections (5) and (6), which provide a mechanism to ensure that a person is only liable for statements that he knows about. These provisions determine that a person is not deemed to endorse a repeat statement if they can demonstrate that they have taken all *reasonable* steps to: (i) prevent such statements becoming available to the public; (ii) ascertain if the statement is available to the public; and (iii) they are not aware that the statement had been published or they were aware that it had been

published but they have taken every reasonable step to ensure it is removed or modified. The Act does not specify what *reasonable* means. This could create difficulties in the context of social media and citizen journalism where issues with ‘speaker control’ means that a publication can be re-published and therefore re-disseminated at an exponential rate<sup>103</sup>. As the defendant bears the burden of proof in this situation, to protect media freedom, and in particular the citizen journalist, what amounts to reasonable remedial steps should be determined on a case-by-case basis, taking into account all of the circumstances surrounding the re-publication, how easy it is for the defendant to give effect to the section 3 notice and the efforts they have gone to in order to achieve this.

This section has illustrated the myriad domestic provisions operating at the intersection between freedom of expression and terrorist activity. As the traditional ‘Fourth Estate’ struggles, and citizen journalism, facilitated by social media, continues to go from strength to strength, it is likely that we will see an increase in cases where the activity of this new breed of journalist, operating as part of the media, potentially conflicts with the interests of national security and the security services in the name of freedom of expression and media freedom. Thus, the following section will consider the social media landscape, the diminishing fortunes of the traditional media, and the continued rise of citizen journalists.

#### 4. THE DEMISE OF THE TRADITIONAL ‘FOURTH ESTATE’ AND THE EMERGENCE OF CITIZEN JOURNALISM

##### A. THE FOURTH ESTATE AND THE REPORTING OF TERRORIST ACTIVITY

Prior to the evolution of the Internet into a network available throughout the world and, in particular, the social media revolution, which transformed that network into an accessible form of mass media, that has facilitated the convergence of audience and producer<sup>104</sup>, traditional press and broadcast companies were the only media

<sup>103</sup> P. Coe, ‘The social media paradox: an intersection with freedom of expression and the criminal law’, *Information & Communications Technology Law* (2015) Vol. 24, Issue 1, 16-40, 26.

<sup>104</sup> See generally: A. Bruns, *Blogs, Wikipedia, Second Life and Beyond: From Production to Produsage*, (Peter Lang Publishing, 2008)



institutions that had the ability to reach mass audiences through regular publication or broadcasts<sup>105</sup>. In contrast to the examples of high quality investigative public interest journalism provided by Leveson LJ's *Inquiry*<sup>106</sup>, there is no doubt that, in recent years, an increasing number of traditional media outlets choose to engage with 'sexy' stories that sell, as opposed to reporting on matters of public concern<sup>107</sup>. As a result, the traditional media's public watchdog role gradually diminished towards the end of the twentieth century and, instead, the focus has shifted onto commercially viable stories<sup>108</sup>. Media ownership, and the power derived from it, means that there is a constant conflict between the traditional media's Fourth Estate role as a watchdog, or gatekeeper, and commercial reality. Indeed, during the twentieth century there has been a dilution of news media ownership, which is now vested in a relatively small number of large and powerful companies. Accordingly, this ownership concentration has had a detrimental affect on investigative journalism<sup>109</sup>, a role of the press and wider media that Lord Nicholls considered vital in *Reynolds*<sup>110</sup>. Indeed, large proportions of the traditional press and broadcast media facilitate 'churnalism', that is the regurgitation of existing stories from the same source, rather than engaging with sound investigative journalism as a result of, for instance, commercial pressures and restraints<sup>111</sup>.

The traditional media has, undoubtedly, being responsible for some exemplary work in relation to the investigative reporting of terrorist activity. For instance, Sky News was recently at the forefront of uncovering thousands of documents detailing

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<sup>105</sup> See generally: J. Van Dijck, *The Culture of Connectivity A Critical History of Social Media*, (Oxford University Press, 2013), 3-23

<sup>106</sup> Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press*, November 2012, 455-470

<sup>107</sup> Numerous examples are provided by Leveson LJ in his Inquiry: Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press*, November 2012, 539-591; See generally: N. Davies, *Flat Earth News*, (Vintage, 2009).

<sup>108</sup> For example, see: C. Calvert and M. Torres, 'Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet' (2011) *Vanderbilt Journal of Entertainment and Technology Law* 323, 341; J. Curran and J. Seaton, *Power Without Responsibility – Press, Broadcasting and the Internet in Britain*, (7<sup>th</sup> ed. Routledge, 2010), 96-98; E. Cashmore, *Celebrity Culture*, (2<sup>nd</sup> ed. Routledge, 2014)

<sup>109</sup> S.L. Carter, 'Technology, Democracy, and the Manipulation of Consent' (1983-1984) *Yale Law Journal* 581, 600-607; P. Garry, 'The First Amendment and Freedom of the Press: A Revised Approach to the Marketplace of Ideas Concept' (1989) 72 *Marquette Law Review* 187, 189; See also Leveson LJ's assessment of the commercial pressures on the press: Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press*, November 2012, 93-98

<sup>110</sup> See fn 14-15.

<sup>111</sup> See generally: N. Davies, *Flat Earth News*, (Vintage, 2009).

important information about Islamic State jihadis<sup>112</sup>. These 'ISIS Files' were, subsequently, passed on to the security services, and will clearly help to combat the extremist activity of Islamic State. To the contrary, a number of incidents relating to the reporting of terrorist activity, both within the UK and in the US, do not just animate the demise of the traditional media, but also expose its susceptibility to bias and 'churnalism', based on commercial and political pressures. Further, they provide examples of conflict with the principles underpinning the Fourth Estate discussed earlier in this chapter.

In Davies' wide-ranging investigation into allegations of falsehood and propaganda in the media, he considers a number of 'terror error' stories published by the UK press in the wake of the London bombings in July 2005<sup>113</sup>. For example, before discovering that all four bombers were British-born, the *Independent on Sunday* blamed the attack on 'white mercenary terrorists'<sup>114</sup> whilst, according to the *Sunday Telegraph*, the perpetrators were 'a foreign-based Islamic terrorist cell'<sup>115</sup>. The Times reported that the 'the London rush-hour bombers are alive and planning another attack'<sup>116</sup>, before admitting that they were actually all dead. Indeed, according to Davies, Fleet Street newspapers identified four different 'masterminds' behind the bombings; the *Daily Mail* warned that a fifth terrorist was on the loose; and, after the failed attempt at bombings two weeks later, the *Sunday Times* reported that a third cell was in operation – all of which was later directly contradicted by the police and intelligence agencies<sup>117</sup>. Similar examples of 'terror error' stories were published by the US press after the 9/11 bombings - none of which turned out to be true. Instead, they were 'pumped into the media by official sources who either genuinely did not know the truth or did not care but hoped for some political advantage'.<sup>118</sup>

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<sup>112</sup> S. Ramsay, 'IS Documents Identify Thousands Of Jihadis', 10<sup>th</sup> March 2016, <http://news.sky.com/story/1656777/is-documents-identify-thousands-of-jihadis> accessed 17th May 2016

<sup>113</sup> N. Davies, *Flat Earth News*, (Vintage, 2009), 35.

<sup>114</sup> S. Goodchild et al, 'Police hunt 'mercenary' terror gang recruited by al-Qa'ida', 9<sup>th</sup> July 2005 <http://www.independent.co.uk/news/uk/crime/police-hunt-mercenary-terror-gang-recruited-by-al-qaida-5346470.html> accessed 17th May 2016.

<sup>115</sup> P. Hennessy et al, 'Foreign terrorist cell' was behind London bombings', 10<sup>th</sup> July 2005 <http://www.telegraph.co.uk/news/uknews/1493717/Foreign-terrorist-cell-was-behind-London-bombings.html> accessed 17th May 2016.

<sup>116</sup> M. Evans et al, 'Terror alert highest ever as police fear new attack', 11<sup>th</sup> July 2005 <http://www.thetimes.co.uk/tto/news/uk/article1935272.ece> accessed 17th May 2016.

<sup>117</sup> N. Davies, *Flat Earth News*, (Vintage, 2009), 35.

<sup>118</sup> *ibid.* 34.

This point is developed further in relation to the reporting in the US of terrorist activities relating to Abu Musab al-Zarqawi. According to Davies: '[b]y the time he was killed in Iraq in June 2006, Zarqawi had become the most notorious Islamist fighter in the world, exceeding even Osama bin Laden in the scale of the killing which was attributed to him...We now know that a high proportion of what was said about Zarqawi was false'<sup>119</sup>. It transpired that the stories published about Zarqawi were the result of 'strategic communications' – information 'campaigns' by government agencies to strategically manipulate global perception of terrorist threats through the manipulation of a weakened traditional media prone to 'churnalism'<sup>120</sup>.

Similarly, a high profile example from the UK of the media (in this case the *Sunday Times*) publishing politically bias stories based upon 'official communications' from government agencies, that subsequently turn out to be false, relates to the notorious shooting by the SAS of members of the IRA in Gibraltar in 1988. At 4:45pm on Sunday 6<sup>th</sup> of March the Ministry of Defence (MoD) released a statement that three suspected terrorists had been shot dead by security forces and that a 'suspected bomb' had been found. The MoD continued to provide off-the-record guidance to the media, which culminated in bulletins stating that the bomb was located in a crowded street and gunfire was exchanged between the terrorists and SAS personnel in an area containing civilians. To the contrary the three IRA terrorists had been shot dead by the SAS at 3:47pm. There had been no exchange of gunfire – as the security forces knew within minutes of the shooting – as none of the suspects carried any weapons. Further, by 7:30pm, at the very latest, the MoD knew there was no bomb. Despite this, misinformation continued to be fed to the media until 3:30pm the following day.

From a Fourth Estate perspective, even more worrying than the MoD purposefully misinforming the media, was the now infamous reaction of the *Sunday Times*, which made no secret of its political partisanship - being allied to Margaret Thatcher's Conservative government<sup>121</sup>. Rather than investigate the MoD's actions

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<sup>119</sup> *ibid.* chapter 6.

<sup>120</sup> *ibid.*

<sup>121</sup> *ibid.* 305

the newspaper returned to the MoD to acquire further information to produce a story headlined ‘SAS: Why we fired at IRA gang’. A further feature declared that this was ‘another victory for Britain’s security services’ and reproduced, as fact, several passages of ‘highly contentious’ MoD briefing<sup>122</sup>. Following Thames Television’s *Death on the Rock* documentary, which presented key witnesses casting serious doubt on the ‘official’ story, the *Sunday Times* published an attack on the studio, supported by official guidance from the MoD. At this point, key *Sunday Times* reporters began to become concerned that the newspaper was intent on supporting the official MoD line, rather than considering any contradictory information, to the extent that they ‘disowned’ the story<sup>123</sup>. However, the newspaper continued to publicly support the official line and attack Thames Television. Eventually, nine months after the initial story, the *Sunday Times* was forced to retract<sup>124</sup>.

These incidents, and the way in which they were reported by the traditional media, are symptomatic of the challenges faced by, in particular, the press industry that is, not only subject to challenges posed by factors such as owner or political bias, but also by an extremely challenging financial climate, that has increasingly necessitated reporting and publishing decisions to be made based on commercial viability rather than adhering to the principles underpinning the Fourth Estate. Although this has, arguably, always been the case, it appears that ‘churnalism’ is on the increase, simply because of the costs involved with running a newspaper. Clearly, the traditional media is still an excellent source of valuable information and important investigative work. However, the independence associated with citizen journalism has amplified the fact that the traditional media can no longer always be relied upon to exercise its role as the public watchdog, through, for instance, conducting sound investigative journalism.

The following section will consider the demise of the traditional Fourth Estate media, and how its role as the public watchdog is being usurped by an internet-based ‘Fifth Estate’.

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<sup>122</sup> *ibid.* see chapter 8 generally.

<sup>123</sup> *ibid.* 306-311.

<sup>124</sup> The newspaper’s version of events was undermined by detailed evidence given at the inquest into the shootings in Gibraltar; and from Lord Windlesham’s inquiry into the *Death on the Rock* documentary. *ibid.* 310.

## B. THE DEMISE OF THE TRADITIONAL MEDIA AND THE RISE OF CITIZEN JOURNALISM: A BRAVE NEW WORLD

Citizen journalists, through the use of social media are, in many instances, replacing the traditional media as the public's watchdog, consequently giving rise to what has been described as, an internet-based 'Fifth Estate'<sup>125</sup>.

Until relatively recently, the public were, to a great extent, limited as to what they were exposed to reading or seeing, by what large proportions of the traditional media chose to publish or broadcast. Such decisions may have come down to editorial control, based on, for instance, owner or political bias, commercial revenue, or both, rather than being based on the results of sound investigative journalism<sup>126</sup>. However, the emergence of social media, that has enabled citizen journalists to communicate with, potentially, millions of people, means that the ability to reach mass audiences is no longer something that is monopolised by traditional media institutions. Thus, social media platforms have changed the traditional media landscape forever, as they have altered our perceptions of the limits of communication, and reception of information. It is no longer the case that communication is constrained by boundaries, such as location, time, space or culture<sup>127</sup>, or dictated by a media organisation's ownership, political bias<sup>128</sup> or commercial partners<sup>129</sup>. Access to multiple social media platforms twenty-four hours a day, that are instantaneously accessible, allows users,

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<sup>125</sup> A. Cohen, 'The media that need citizens: The First Amendment and the fifth estate' (2011) 85 S Cal L Rev 1; I. Cram, *Citizen Journalists* (Edward Elgar Publishing, 2015), 39.

<sup>126</sup> E. Barendt, *Freedom of Speech*, (2<sup>nd</sup> ed. Oxford University Press, 2005), 12; See also: Similar issues have arisen in the print press with regard to commercial advertising. For example, in January 2015, a number of Daily Telegraph journalists voiced their concerns over the newspaper allegedly discouraging them from writing unfavourable stories about advertising and commercial partners. Furthermore, the journalists provided examples to Newsnight of how commercial concerns impacted upon coverage given to China and Russia. See: C. Cook, *More Telegraph writers voice concern*, 19<sup>th</sup> February 2015, <http://www.bbc.co.uk/news/health-31529682> accessed 19<sup>th</sup> April 2016

<sup>127</sup> See generally: F. Webster, *Theories of the Information Society*, (4<sup>th</sup> ed, Routledge, 2014), 20; I. Barron and R. Curnow, *The Future with Microelectronics: Forecasting the Effects of Information Technology*, (Pinter, 1979); G. Mulgan, *Communication and Control: Networks and the New Economies of Communication*, (Polity, 1991); S. Coleman and J. Blumler, *The Internet and Democratic Citizenship – Theory, Practice and Policy*, (Cambridge University Press, 2009), 27-28

<sup>128</sup> For example, see *Rupert Murdoch will decide Sun stance on Brexit, says its ex-political editor*, 16<sup>th</sup> March 2016, [http://www.theguardian.com/media/2016/mar/16/rupe-murdoch-sun-brexit-eu-referendum-trevor-kavanagh?CMP=tw\\_t\\_a-media\\_b-gdnmedia](http://www.theguardian.com/media/2016/mar/16/rupe-murdoch-sun-brexit-eu-referendum-trevor-kavanagh?CMP=tw_t_a-media_b-gdnmedia) accessed 16<sup>th</sup> March 2016

<sup>129</sup> For example, see: C. Cook, *More Telegraph writers voice concern*, 19<sup>th</sup> February 2015, <http://www.bbc.co.uk/news/health-31529682> accessed 19<sup>th</sup> May 2015; See also: E. Barendt, *Freedom of Speech*, (2<sup>nd</sup> ed. Oxford University Press, 2005), 12

forming what Benkler refers to as the ‘networked public sphere’<sup>130</sup>, to transmit and receive information to one and other, via ‘social networking sites’ (SNS), such as Facebook or Twitter, and ‘user generated content’ (UGC) platforms, that include YouTube, blogs and vlogs<sup>131</sup>, without the need to consider, what have become, the boundaries and restrictions mentioned above<sup>132</sup>. This is illustrated by using statistics to compare the use of social media with traditional media. For example, the New York Times 2013 print and digital circulation was approximately two million<sup>133</sup>, enabling it to proclaim that it was the “#1 individual newspaper site” on the internet, with nearly thirty-one million unique visitors per month<sup>134</sup>. In contrast, YouTube, which is owned by Google, has one billion unique visitors per month<sup>135</sup> which, according to Ammori, equates to: “thirty times more than the New York Times, or as many unique visitors in a day as the [New York] Times has every month”<sup>136</sup>. According to WordPress’ statistics, it hosts blogs written in over 120 languages, equating to over 409 million users viewing more than 15.5 billion pages each month. Consequently, users produce approximately 41.7 million new posts and 60.5 million new comments on a monthly basis. As of December 2015, Twitter states that it has 320 million active users<sup>137</sup> and normally ‘takes in’ approximately 500 million Tweets per day, equating to an average of 5,700 Tweets per second<sup>138</sup>. It has more visitors per week than the New York Times does in a month<sup>139</sup>. Similarly, Tumblr hosts over 170 million microblogs<sup>140</sup> and, with 300 million visits per month, enjoys ten times more

<sup>130</sup> Y. Benkler, *The Wealth of Networks* (Yale University Press, 2006), 212

<sup>131</sup> J. Van Dijck, *The Culture of Connectivity A Critical History of Social Media*, (Oxford University Press, 2013), 8

<sup>132</sup> See generally: B. Wellman, ‘Physical Space and Cyberspace: The Rise of Personalised Networking’, *International Journal of Urban and Regional Research* 25(2), 227-51; P. Coe, ‘The social media paradox: an intersection with freedom of expression and the criminal law’, *Information & Communications Technology Law*, (2015), Vol. 24, Issue 1, 16-40, 21-22

<sup>133</sup> C. Haughney, *Newspapers Post Gains in Digital Circulation*, New York Times, 30<sup>th</sup> April 2014, <http://www.nytimes.com/2013/05/01/business/media/digital-subscribers-buoy-newspaper-circulation.html> accessed 19th May 2015

<sup>134</sup> New York Times Media Kit, <http://perma.cc/B5KA-VMGC> accessed 12th September 2014

<sup>135</sup> Statistics YouTube, <http://perma.cc/S8W5-ZRM4>, accessed 19th May 2015

<sup>136</sup> M. Ammori, ‘The “new” New York Times: Free speech lawyering in the age of Google and Twitter’, *Harvard Law Review*, 2014, vol. 127: 2259-2295, 2266

<sup>137</sup> <https://about.twitter.com/company> accessed 17th March 2016

<sup>138</sup> <https://blog.twitter.com/2013/new-tweets-per-second-record-and-how> accessed 9th January 2015

<sup>139</sup> M. Ammori, ‘The “new” New York Times: Free speech lawyering in the age of Google and Twitter’, *Harvard Law Review*, 2014, vol. 127: 2259-2295, 2266

<sup>140</sup> *ibid.* 2272

than the New York Times<sup>141</sup>. According to Facebook, as of December 2015, it had 1.59 billion monthly active users, 934 million of which use their mobile applications to access the platform on a daily basis<sup>142</sup>. Late 2013 saw Instagram's global usage expand by 15%, in just two months, to 150 million people<sup>143</sup>. Latest figures show that this has now increased to 400 million<sup>144</sup>. LinkedIn's current membership exceeds 400 million<sup>145</sup>. These established platforms are only the 'tip of the social media iceberg'. Pinterest continues to grow rapidly<sup>146</sup>, as do emerging platforms, such as Snapchat and WhatsApp<sup>147</sup>. Consequently, for many people, new media platforms have not just replaced the written word; they have become a substitute for the spoken word<sup>148</sup>.

This 'reach' of social media amplifies the way that the media in general envelopes our existence. Traditional media organisations simply no longer monopolise the methods we use to find and facilitate news-gathering, communication or reception, or indeed how we express opinions and ideas. As a result, social media, and citizen journalism, has become an increasingly important source of news<sup>149</sup>. This is demonstrated by the available evidence relating to emerging trends in how news content is generated and disseminated in both the US and the UK. In September 2012 the *Pew Research Centre* published a report that analysed trends in news consumption by US citizens between 1991 to 2012<sup>150</sup>. The report confirmed that print newspaper

<sup>141</sup> J. Yarow, *The Truth About Tumblr: Its Numbers Are Significantly Worse than You Think*, Business Insider, 21<sup>st</sup> May 2013 <http://www.businessinsider.com/tumblrs-active-users-lighter-than-expected-2013-5> accessed 19th May 2015

<sup>142</sup> <https://newsroom.fb.com/key-facts> accessed 17<sup>th</sup> March 2016

<sup>143</sup> <http://instagram.com/press/#>; UK Social Media Statistics for 2014, <http://socialmediatoday.com/kate-rose-mcgrory/2040906/uk-social-media-statistics-2014>, accessed 19th May 2015

<sup>144</sup> <http://instagram.com/press/#> accessed 17<sup>th</sup> March 2016

<sup>145</sup> <https://press.linkedin.com/about-linkedin> accessed 17<sup>th</sup> March 2016

<sup>146</sup> In 2011/2012 Pinterest had approximately 200,000 users in the UK. In the summer of 2013 this had grown to over 2 million: <http://socialmediatoday.com/kate-rose-mcgrory/2040906/uk-social-media-statistics-2014>, accessed 19th May 2015

<sup>147</sup> In February 2016 it was announced that WhatsApp had reached 1 billion active monthly users. See: 'WhatsApp reaches a billion monthly users' <http://www.bbc.co.uk/news/technology-35459812> 1st February 2016 accessed 17<sup>th</sup> March 2016

<sup>148</sup> P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information & Communications Technology Law*, (2015), Vol. 24, Issue 1, 16-40, 24

<sup>149</sup> See generally: L. Durity, 'Shielding Journalist-"Bloggers": The Need to Protect Newsgathering Despite the Distribution Medium' (2006) 5 *Duke Law & Technology Review* 1; J.S. Alonzo, 'Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can save the Press' (2006) 9 *New York University Journal of Legislation and Public Policy* 751, 754

<sup>150</sup> Pew Research Centre, 'In Changing News Landscape, Even Television is Vulnerable', 27<sup>th</sup> September 2012 <http://www.people-press.org/2012/09/27/in-changing-news-landscape-even-television-is-vulnerable/> accessed 16<sup>th</sup> March 2016

sales were declining<sup>151</sup>, and that a younger demographic of news consumers, comprising of adults under 30 years old, were turning to online and social media news sources, rather than television news. Indeed, between 2010 and 2012, the percentage of US citizens, across all age groups, receiving their news from social media, and in particular SNSs, increased from 9% to 19%. Accordingly, the report states that SNSs were the preferred source of news for 33% of the under-30s age group; with just of this group 13% obtaining their news from either the print or digital formats of newspapers. These figures are reflected in a more recent report from *Pew*<sup>152</sup>, which confirms that ‘millennials’ (persons born between 1981 and 1996) are most likely to obtain information about the 2016 presidential election via social media (Facebook is the most used platform, followed by Twitter and YouTube). The report states that of the 91% of all US adults who ‘learned’ about the election between the 12<sup>th</sup> to the 27<sup>th</sup> of January 2016, 14% claimed social media was the ‘most helpful’ source of information. Similarly, 13% claimed that news websites and mobile applications were the most helpful. However, in comparison, only 3% and 2% felt that local and national print newspapers respectively fell into the ‘most helpful’ source category.

As Cram suggests, the *Pew Centre*’s figures are indicative of a broader trend outside the US and, significantly, in the UK<sup>153</sup>. Between March 2014 to March 2015 average national daily newspaper sales fell by half a million –from 7.6 million to just over 7 million per day. During this period, The Daily Mail and The Times were the ‘best performers’, but even they recorded significant losses in circulation. The Mail’s year-on-year circulation decreased by 4.7%, whereas The Times saw its sales decline by 0.9%<sup>154</sup>. According to the most recent Audit Bureau of Circulations’ (ABC)<sup>155</sup>

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<sup>151</sup> This particular trend has been detected by the Pew Research Centre in a report which considers the diminishing financial viability of newspapers in the US over a 2 is evidenced by regular occurrences of ownership change as successive owners tried and failed to prevent declining circulation levels that, sequentially, generate less advertising revenue. See Pew Research Centre, ‘The declining value of US newspapers’ 22<sup>nd</sup> May 2015 <http://www.pewresearch.org/fact-tank/2015/05/22/the-declining-value-of-u-s-newspapers/> accessed 16<sup>th</sup> March 2016; see generally: I. Cram, *Citizen Journalists* (Edward Elgar Publishing, 2015), 1

<sup>152</sup> Pew Research Centre, ‘The 2016 Presidential Campaign – a News Events That’s Hard to Miss’, 4<sup>th</sup> February 2016 <http://www.journalism.org/2016/02/04/the-2016-presidential-campaign-a-news-event-thats-hard-to-miss/>; See also: Pew Research Centre, ‘News Habits on Facebook and Twitter’, 14<sup>th</sup> July 2015 <http://www.journalism.org/2015/07/14/news-habits-on-facebook-and-twitter/> both accessed 16<sup>th</sup> March 2016

<sup>153</sup> I. Cram, *Citizen Journalists* (Edward Elgar Publishing, 2015), 2

<sup>154</sup> J. Jackson, ‘National daily newspaper sales fall by half a million in a year’, *The Guardian*, 10<sup>th</sup> April 2015 <http://www.theguardian.com/media/2015/apr/10/national-daily-newspapers-lose-more-than-half-a-million-readers-in-past-year> accessed 17<sup>th</sup> March 2016



report, this overall decline is continuing, at a rather rapid rate. It suggests that the overall daily newspaper market is shrinking by more than 8% per year, and the Sunday market by a little over 9%, with daily and Sunday red-tops falling faster than the rest. In a year, the Sun, Daily Mirror and Daily Star have seen their circulation fall by more than 370,000, or 10.9%. The four Sunday red-tops (the Sun, Mirror, Star and People) have, collectively, seen a 12.3% decline in circulation since 2014; a fall in sales of 400,000. Broadsheets have not been immune to the fate suffered by the red-tops. For instance, ABC statistics show that The Independent and the Guardian have suffered year-on-year decreases in circulation of 8.1% and 7.6% respectively<sup>156</sup>.

The decline of the traditional media and the ascendancy of social media has been a catalyst for the growth of citizen journalism, and the emergence of an online Fifth Estate. Indeed, the importance attributed to citizen journalism is demonstrated by this breed of journalist being officially recognised as press<sup>157</sup>. As Cram observes, these conditions have allowed social media and citizen journalism to transform: ‘...the average citizen’s hitherto largely passive experience of political debate led by elite opinion formers into something much more vibrant and more participative’<sup>158</sup>. Other scholars, who have made this democratisation argument<sup>159</sup>, have emphasised the empowerment<sup>160</sup> of what Volokh has referred to as ‘cheap speech’: ‘The new technologies...will, I believe, both democratize the information marketplace – make it more accessible to comparatively poor speakers as well as the rich ones – and diversify it’<sup>161</sup>. This ability of social media to create a democratised digital public sphere has also been acknowledged by the US Supreme Court in *Reno v ACLU*<sup>162</sup>, in which Justice Stevens stated that online chatrooms would enable anyone to become a

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<sup>155</sup> <http://www.abc.org.uk>

<sup>156</sup> R. Greenslade, ‘Are national newspaper sales heading for a cliff? Not quite yet...’, *The Guardian*, 9<sup>th</sup> October 2015 <http://www.theguardian.com/media/greenslade/2015/oct/09/are-national-newspaper-sales-heading-for-a-cliff-not-quite-yet> accessed 17<sup>th</sup> March 2016

<sup>157</sup> See the High Court of Ireland case of: *Cornec v Morrice* [2012] IEHC 376; K.Q. Seelye, *White House Approves Press Pass for Blogger*, New York Times, 7<sup>th</sup> March 2005 [http://www.nytimes.com/2005/03/07/technology/07press.html?\\_r=0](http://www.nytimes.com/2005/03/07/technology/07press.html?_r=0) accessed 19<sup>th</sup> May 2015.

<sup>158</sup> I. Cram, *Citizen Journalists* (Edward Elgar Publishing, 2015), 3.

<sup>159</sup> For example, see the comments of Joe Trippi cited in M. Hindman, *The Myth of Digital Democracy* (Princeton University Press, 2009); *ibid.* (Cram).

<sup>160</sup> *ibid.* (Cram) 3-4.

<sup>161</sup> E. Volokh, ‘Cheap speech and what it will do’ (1995) 104 *Yale LJ* 1805, 1833. See also: P. Schwartz, ‘Privacy and democracy in cyberspace’ (1999) 52 *Vand L Rev* 1609; J. Rowbottom, ‘Media freedom and political debate in the digital era’ (2006) *Modern Law Review* 489.

<sup>162</sup> (1997) 521 US 844.

‘town crier with a voice that resonates further than it would from a soap box’<sup>163</sup>, a situation animated by the following examples. The death of Osama Bin Laden was leaked on Twitter, before being published by any newspaper<sup>164</sup>. Syria’s President, Bashar al-Assad, and his opposing rebels have distributed competing propaganda via Instagram<sup>165</sup>. Chelsea Manning, the US soldier convicted in 2013 for, inter alia, offences pursuant to the Espionage Act, leaked classified documents to WikiLeaks, as opposed to a traditional media outlet<sup>166</sup>. The value of citizen journalism has been summarised by the Council of Europe’s Committee of Ministers, which stated:

‘Citizens’ communication and interaction in online environments and their participation in activities that involve matters of public interest can bring positive, real-life, social change. When freedom of expression and the right to receive and impart information and freedom of assembly are not upheld online, their protection offline is likely to be undermined and democracy and the rule of law can also be compromised’<sup>167</sup>

Despite the fact that, never before has a form of media changed the scale, pace or pattern of human affairs to such an extent, within such a short period of time as social media has, this section will conclude with a caveat. Although social media platforms are now a vital, and often the preferred method of imparting and receiving news<sup>168</sup>, citizen journalism’s contribution to matters of public interest cannot be

<sup>163</sup> *ibid.* 862.

<sup>164</sup> B. Shelter, *How the Bin Laden Announcement Leaked Out*, New York Times, 1<sup>st</sup> May 2011, [http://mediadecoder.blogs.nytimes.com/2011/05/01/how-the-osama-announcement-leaked-out/?\\_php=true&\\_type=blogs&\\_r=0](http://mediadecoder.blogs.nytimes.com/2011/05/01/how-the-osama-announcement-leaked-out/?_php=true&_type=blogs&_r=0) accessed 19<sup>th</sup> May 2015.

<sup>165</sup> N. Gaouette, *Assad on Instagram Vies with Rebel Videos to Seek Support*, Bloomberg, 19<sup>th</sup> September 2013, <http://www.bloomberg.com/news/2013-09-19/assad-on-instagram-vies-with-rebel-videos-to-seek-support.html> accessed 19<sup>th</sup> May 2015.

<sup>166</sup> Benkler, above n 75, 348.

<sup>167</sup> Para. 3, *Declaration by the Committee of Ministers on the protection of freedom of expression and information and freedom of assembly and association with regard to Internet domain names and name strings* (Adopted by the Committee of Ministers on 21<sup>st</sup> September 2011) <https://wcd.coe.int/ViewDoc.jsp?id=1835805> accessed 17<sup>th</sup> March 2016.

<sup>168</sup> According to Ofcom’s report, ‘The Communications Market 2013’, at [1.9.7], 23% of people use social media platforms, such as Facebook and Twitter, for news: [http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr13/UK\\_1.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr13/UK_1.pdf) accessed 19<sup>th</sup> May 2015. For a US perspective, see the following *Pew Research Centre* reports: ‘In Changing News Landscape, Even Television is Vulnerable’, 27<sup>th</sup> September 2012 <http://www.people-press.org/2012/09/27/in-changing-news-landscape-even-television-is-vulnerable/>; ‘The 2016 Presidential Campaign – a News Events That’s Hard to Miss’, 4<sup>th</sup> February 2016 <http://www.journalism.org/2016/02/04/the-2016-presidential-campaign-a-news-event-thats-hard-to-miss/>; ‘News Habits on Facebook and Twitter’, 14<sup>th</sup>

overrated, just as traditional journalism should not be underestimated<sup>169</sup>. This is because social media can facilitate the instantaneous, and often spontaneous, expression of opinions and venting and sharing of emotions, thoughts and feelings<sup>170</sup>. Consequently, the internet is saturated with poorly researched, biased and meaningless material. For instance, in his Inquiry, Leveson LJ refers to Popbitch that, in his Lordship's opinion, is: 'clear in its ambition to entertain and understands itself to "poke fun" and comment on the "lighter" side of celebrity culture'<sup>171</sup>.

Despite the best intentions of some serious citizen journalists, they may still lack the education, qualifications and experience to distinguish themselves from professional journalists. Indeed, bloggers post information despite being uncertain as to its provenance and without verifying it for reliability, and instead, rely on readers to judge its accuracy<sup>172</sup>. To the contrary, a blog by a professional journalist may include spontaneous comments and conversation, whilst being supported by professional experience and resources<sup>173</sup>. Ultimately, there exists a symbiosis between citizen journalism and the traditional media that has been articulated by a number of commentators. Essentially, this relationship is mutually beneficial because professional journalists and traditional media entities research and cover the findings of citizen journalism that, sequentially, adds credence to the citizen journalist's work and facilitates the wider dissemination of their research<sup>174</sup>.

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July 2015 <http://www.journalism.org/2015/07/14/news-habits-on-facebook-and-twitter/> all accessed 16<sup>th</sup> March 2016

<sup>169</sup> J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 63.

<sup>170</sup> Indeed, in April 2014 Facebook emailed its users to inform them that the messages function would be moved out of the Facebook application, due to its Messenger application enabling users to reply 20% faster than using Facebook.

<sup>171</sup> Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press*, November 2012, 168 [4.3].

<sup>172</sup> J.S. Alonzo, 'Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can save the Press' (2006) 9 *New York University Journal of Legislation and Public Policy* 751, 755.

<sup>173</sup> Rowbottom argues for a high and low level distinction for speech that is based on the context within which the expression is made, as opposed to a value based distinction deriving from the content of the expression. See: J. Rowbottom, 'To rant, vent and converse: protecting low level digital speech', (2012) *C.L.J.* 71(2), 355-383, 371.

<sup>174</sup> J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 64; C. Calvert and M. Torres, 'Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet' (2011) *Vanderbilt Journal of Entertainment and Technology Law* 323, 345; J. Curran and J. Seaton, *Power Without Responsibility – Press, Broadcasting and the Internet in Britain*, (7<sup>th</sup> ed. Routledge, 2010), 286.

## 5. CONCLUSION

It is clear from the prevailing sections that striking a balance between the interests of national security and freedom of expression and media freedom, particularly in the context of social media and citizen journalism is, and will continue to be, challenging. It remains to be seen what impact the ascendance of citizen journalism will have on some of the existing laws and principles relating to the dissemination of publications regarding national security and terrorism. Only time, and case law, may paint a clearer picture – if that is ever possible in a world where media is developing at such an incredible pace. It's unlikely that the law will ever actually catch-up with today's, let alone tomorrow's, technology. Ultimately, we may always be faced with having to 'make-do' with a 'square-peg-round-hole' regime. Consequently, in order for an appropriate balance to be struck, those operating at the intersection of these interests and rights must ensure that they remain attuned to, not only the complex laws that govern this area, but also the constantly evolving social and media environment.